

# ANDERSON KILL NEW JERSEY

# ALERT

## **Eight Steps to Insurance Coverage for PFAS Liability**

By Robert D. Chesler and Nicholas M. Insua

### **1. What insurance policies may apply to PFAS groundwater contamination?**

Historic commercial general liability (CGL) policies may apply to PFAS groundwater contamination. CGL policies provide insurance coverage for liability stemming from property damage. In every state, groundwater contamination constitutes covered property damage. In almost all states, if groundwater contamination began prior to 1986, policies in effect prior to that date have a duty to respond.

### **2. What about pollution exclusions in general liability policies?**

In about 1986, the insurance industry added an absolute pollution exclusion to general liability insurance policies. That exclusion forecloses coverage for PFAS contamination under post-1986 policies.

In about 1973, the insurance industry added the so-called ‘sudden and accidental’ pollution exclusion to general liability policies. In some states, this is a bar to coverage under post-1973 policies, unless the groundwater contamination is the result of, for example, a tank rupture or other ‘boom’ event. It is possible that a court would consider the use of PFAS foam to put out a fire as a covered ‘sudden and accidental’ event.

Other states essentially ignore the sudden and accidental pollution exclusion. In those states, coverage will exist under pre-1986 general liability insurance policies.

### **3. How do I know when the groundwater contamination commenced?**

It is the policyholder’s burden to show that contamination commenced prior to 1986 or 1973. Sometimes, the answer can come from the site’s operational history. A fire may have occurred on

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a certain date, and fire-fighting foam containing PFAS may have been used to put out the fire. Records may indicate when products containing PFAS were purchased.

For many chemicals, dating can occur based on the degradation of the chemical into breakdown products. However, PFAS barely degrades in groundwater. It may be possible to date the contamination on the basis of how far the plume of contaminants has traveled. In some cases, dating can be more of an art than a science.

#### 4. How do I know which state's law applies?

If a company is headquartered in the same state where the contamination exists, that state's law normally will apply.

However, if a company is headquartered in a state different from the one where the contamination exists, choice of law questions will arise. Some states apply the law of the state where the contamination takes place. Other states will apply the law of the state where the company is headquartered or where the insurance policy was entered into.

As an example, in one case, a Texas company was responsible for pollution in New Jersey. Texas applies the law of the state where the company is headquartered and where the insurance policy is entered into. Under Texas law, coverage for pollution would not exist. New Jersey applies the law of the state where the hazardous waste site is located, and coverage would exist under New Jersey law. The insurance company sued its policyholder in Texas, and the company lost coverage. A sophisticated choice of law analysis is often essential to coverage.

#### 5. Whose insurance policies apply?

The policies of the company that owned or operated the site prior to 1986 or 1973 will apply. If a company owned or operated the site prior to 1986/1973, its policies will apply. If a company acquired the property after 1986, it will need to look to the policies of the prior owner/operator. Frequently, rights to the insurance policies are transferred at the time of merger or acquisition, so that the responsible party will be able to proceed under the predecessor's policies. If the rights to the policies were not transferred, then the responsible company can ask the predecessor for an assignment of the policy rights. If that does not work, a responsible company may need to sue the predecessor to obtain access to the insurance policies.



## 6. How do I find my old insurance policies?

Many companies will not have evidence of their pre-1986 policies on hand. It is important to note that actual copies of the policies are not necessary. A company can prove the existence of its policies through secondary evidence. Companies should review their files to see if they contain evidence of historic insurance coverage. A company's insurance broker or risk consultant is another important source of insurance policy information.

Many companies employ an outside insurance archaeologist – that is, a firm specializing in locating old insurance policies. Good insurance archeologists are often successful.

## 7. When should I give notice of the claim to my insurance companies?

Companies must provide notice of the claim to their insurance companies at the earliest opportunity. In a minority of states, late notice of a claim can foreclose coverage. In the majority of states, late notice will only foreclose coverage if the insurance company can demonstrate actual prejudice. In some states, this is an almost impossible hurdle for insurance companies to meet.

## 8. Why use Anderson Kill?

Anderson Kill is an insurance law firm that represents policyholders only in insurance coverage disputes and has never represented an insurance company. The firm's major focus has been on insurance recovery since at least 1980. It has represented dozens of companies in environmental insurance litigation over the past forty years, ranging from Fortune 50 companies to gas stations and dry cleaners. The firm has unparalleled experience and resources in insurance coverage generally and environmental insurance in particular. ▲

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